R. H. Macy & Co., Inc. *and* Evan Nevarez

Local 3, International Brotherhood of Electrical Workers *and* Evan Nevarez. Cases 2-CA-17890 and 2-CB-8728

23 May 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 29 April 1982 Administrative Law Judge Edwin H. Bennett issued the attached Decision in this proceeding. Thereafter, the General Counsel and Local 3, International Brotherhood of Electrical Workers, the Respondent in Case 2-CB-8728 (hereinafter referred to as the Union), filed exceptions and a supporting brief. The Union and R. H. Macy & Co., Inc., the Respondent in Case 2-CA-17890 (hereinafter referred to as Macy's), also filed briefs in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The Administrative Law Judge found that the Union had not violated Section 8(b)(1)(A) and (2) of the Act when it requested that Macy's terminate the employment of the Charging Party herein, Evan Nevarez, because of his failure to pay union dues as required under a valid union-security agreement between Macy's and the Union. We disagree with that finding.[1]

The record evidence in this case reveals that since 1978 until his discharge on 8 January 1981 Nevarez had been employed by Macy's as an electrician. In that capacity, Nevarez was covered by a collective-bargaining agreement containing, *inter alia*, a union-security clause requiring that, as a condition of employment, all unit employees become members of the Union within 30 days of employment. As the contract did not contain a dues-checkoff provision, unit employees submitted their dues directly to the Union. The documentary evidence submitted by the Union reveals that from April 1978 to September 1979 Nevarez paid his dues on a quarterly basis.[2] However, it is undisputed that Nevarez did not remit any dues for the last quarter of 1979 and until 17 December 1980 had remitted no dues for any quarter period in 1980.

On 17 December 1980 Nevarez, fearing that he might be discharged pursuant to the terms of the union-security agreement if he did not correct his dues delinquency,[3] forwarded a check to the Union for $252.80 covering dues owed for the four quarters of 1980, apparently believing that that was all he owed the Union. However, as noted above, Nevarez had not paid dues for the last quarter of 1979 and was, therefore, still in arrears for that quarter.

Sometime in December 1980 the Union's executive board met to discuss the dues status of various members, including that of Nevarez.[4] A form letter dated 30 December 1980 was thereafter mailed out to Nevarez advising him that he had been listed as a "ceased" member,[5] and that if he wished to remain a member he would have to pay the sum of $66.70 (apparently representing dues owed for the last quarter of 1979) plus a reinstatement fee of $30 which, according to the letter, would assure him good standing in the Union until 31 December 1980.[6] Nevarez, however, did not receive that letter until several days after the 31 December date. Upon receipt of the letter Nevarez, believing that his dues had been brought up to date by his 17 December check, phoned the Union and, after questioning the contents of the letter, was told that if he paid the amount stated in the letter he would no longer be a "ceased" member but would be reinstated.

[1] However, we agree with the Administrative Law Judge's finding that Macy's had no reasonable cause to believe that the Union's request for Nevarez' discharge was invalid. Accordingly, we adopt his finding that Macy's did not violate Sec. 8(a)(3) and (1) of the Act, as alleged. See *Valley Cabinet & Mfg.*, 253 NLRB 98 (1980).

[2] The Administrative Law Judge discredited Nevarez' testimony that he always paid his dues in advance. Rather, relying on documentary evidence, he found that Nevarez' dues, which, according to the Union's recording secretary, William Fiedler, were required by the Union's bylaws to be paid 6 months in advance, had been untimely remitted during the middle of each quarter. Nevertheless, it appears that the Union was willing to condone such late payment of dues since the matter had never been called to Nevarez' attention nor were his late payments ever rejected.

[3] Nevarez admitted knowing that the Union closed its books at the end of the year and that his decision to bring his dues up to date was based on that knowledge. He further admitted knowing of his obligations under the union-security agreement from having read the contract and of the fact that his failure to pay dues could result in his discharge.

[4] The evidence concerning the date of the executive board meeting is conflicting. The Administrative Law Judge found that the meeting occurred on 14 December apparently relying on the fact that the letter sent to Nevarez stated that the meeting was held on that date. Fieder, however, testified that the executive board met only twice in December, on 8 and 22 December.

[5] A member is classified as "ceased" when his dues are in arrears for 6 months or more. A "lapsed" member is one whose dues are in arrears for only 3 months. Although a "lapsed" member is still considered a union member, a "ceased" member is not.

[6] It is apparent to us, and we so find, that the Union had already received Nevarez' check for $252.80 covering dues for 1980 since the Union's letter claimed that Nevarez owed only $66.70 representing dues owed for the last quarter of 1979.

However, the record indicates that on 22 December 1980, approximately 2 weeks prior to Nevarez' receipt of the Union's letter requesting dues, James Mulligan, a Macy's representative, informed Macy's vice president for labor relations, Virginia Caillouette, that Union Business Representative Frank Montemagno had requested that Nevarez be discharged for failing to pay dues for a long period of time. Caillouette advised Mulligan that such a request had to be in writing. Thereafter, a letter dated 26 December 1981 and signed by Montemagno was mailed to Caillouette stating that, according to the Union's records, Nevarez was not a member in good standing having failed to pay dues since September 1979 and requesting that he be discharged from his position as of that date. Caillouette did not receive the letter until 5 January 1981.

Upon receipt of the Union's letter, Caillouette reviewed the collective-bargaining agreement to ensure that the Union's request for Nevarez' discharge was proper and, after doing so, notified Macy's personnel manager, Shirley Thompson, of Nevarez' apparent dues delinquency and instructed that in accordance with the union-security agreement Nevarez should be discharged. On 8 January 1981 Thompson summoned Nevarez into her office and informed him that, pursuant to the Union's request, he was being terminated for failing to pay dues as required under the union contract. Although Nevarez protested that a mistake had been made,[7] he was advised by Thompson that he would have to take the matter up with the Union but that, pursuant to the contract, he was being terminated for failing to pay his dues.[8]

As noted, the Administrative Law Judge correctly found that Macy's did not violate Section 8(a)(3) and (1) of the Act when, at the Union's request, it discharged Nevarez for failing to pay dues since Macy's had no reason for believing that the request might be unlawful.[9] However, he further found that, while the Union may have breached a fiduciary duty owed to Nevarez by not informing him of his dues obligation or affording him an opportunity to clear his account before requesting his discharge,[10] it nevertheless did not violate Section 8(b)(1)(A) and (2) of the Act since, in his view, Nevarez' failure to pay his dues for approximately 15 months qualified him as a "free rider"[11] who was not entitled to the Act's protection.

That the Union breached a fiduciary duty owed to Nevarez can hardly be disputed. The record clearly established that on 22 December 1980, 8 days prior to sending Nevarez his first and only written notification of a dues delinquency, the Union requested that he be discharged for failing to pay his dues. It is evident therefore that Nevarez received no notice of his dues arrearage and was given no opportunity to clear up his account before the discharge request was made. In fact, even if the 30 December letter, which informed Nevarez of a dues shortage in his account, had been received by Nevarez prior to the Union's request for his discharge, the Union would still have fallen short of fulfilling its fiduciary obligation since the 30 December letter not only failed to explain the method by which the amount owed was calculated but also failed to advise him that he would be discharged unless he cleared his account by a certain date. Furthermore, we find no factual basis in the record to support the Administrative Law Judge's finding that "in the first week of January 1981, Nevarez had received adequate and sufficient notice regarding his union-security obligation, the amount of money due and owing, the period of delinquency, and the method of calculation."[12] Rather, the evidence in this regard reveals only that, when Nevarez received the 30 December letter and questioned its contents, the Union repeated that he owed the amounts stated therein and that his membership in the Union would be reinstated if he paid those amounts. There is nothing in the record to indicate that the Union at any time informed Ne-

[7] Nevarez told Thompson that the Union was out to get him because of an earlier discrimination suit he had filed against it.

[8] Nevarez testified that immediately after leaving Thompson's office he went directly to the Union's office where he tendered a check, postdated for the following day, 9 January, in the amount of $225 covering the amount requested by the Union in the 30 December letter plus an advance payment of dues for two additional quarters. He further testified that he returned to Thompson's office later that afternoon in an effort to get reinstated but he was denied reinstatement because of his failure to produce a receipt indicating his dues had been paid. While the Administrative Law Judge discredited Nevarez' testimony that he tendered a check to the Union on 8 January in the above-described amount, it is apparent from the Union's records, which reveal that such a check was deposited by the Union on 20 January, that Nevarez did tender a check for that amount sometime between 9 and 20 January. However, we agree with the Administrative Law Judge that the fact that Nevarez may have tendered his check on the 9 January or any date thereafter has no bearing on the ultimate disposition of the issues here.

[9] The record reveals that Nevarez was subsequently reinstated to his former position sometime in late May 1981.

[10] The Board has long held that a union seeking the discharge of an employee for failing to pay dues must first provide that employee with a statement of the precise amount owed, the method by which that amount was computed, and an opportunity to make payment. *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), enfd. 320 F.2d 254 (3d Cir. 1963).

[11] The term "free rider" has been used by the Board to describe an employee who, while content on receiving the benefits of union representation and with full knowledge of his financial obligations under the terms of a union-security agreement, willfully and deliberately seeks to avoid those obligations. See *Seafarers Great Lakes District (Tomlinson Fleet)*, 149 NLRB 1114 (1964); *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454 (1979). See also *Big Rivers Electric Corp.*, 260 NLRB 329 (1982), and *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB 117 (1974), which the Administrative Law Judge finds to be controlling here.

[12] The Administrative Law Judge did find, however, that no notice was given Nevarez to clear his dues delinquency by a certain date or face discharge.

varez that the $66.70 represented dues owed for the last quarter of 1979 or that it provided him with an explanation of how that amount was computed. Nor did it mention the fact that it had already requested his discharge. Thus, on the basis of the above facts, we find that the Union has not met its fiduciary obligation with respect to Nevarez.

That finding, however, does not end the inquiry for if, as found by the Administrative Law Judge, Nevarez was in fact a "free rider" then the Union's failure to comply with its fiduciary obligation would, under these circumstances, have been excused. In our view, the record fails to support the Administrative Law Judge's finding that Nevarez was a "free rider."

Although the record clearly establishes that Nevarez allowed himself to fall behind 15 months in his dues payments to the Union, we find no evidence to indicate that his failure to make any payments during that period resulted from a willful and deliberate attempt on his part to avoid his financial obligations to the Union. Rather, it appears that Nevarez' failure to keep up with his payments resulted more from inattention and neglect, induced in large part by the Union's own inattention to such matters,[13] rather than from any deliberate or conscious effort on his part to avoid paying dues. In fact, Nevarez' subsequent conduct in mailing to the Union, before any request for his discharge had been made,[14] a check for what he in good faith, but erroneously, believed was sufficient to cover his dues arrearage should lay to rest any claim that Nevarez was deliberately seeking to avoid his obligations. Further, Nevarez' failure to include dues for the last quarter of 1979 in his 17 December check does not appear to have resulted from an intentional act but from a lack of knowledge as to the extent of his dues delinquency. Indeed, it is highly unlikely that Nevarez, who admittedly was concerned that he might lose his job if he did not bring his account up to date, would tender dues for the entire year of 1980, but would risk losing his job by deliberately withholding dues for the last quarter of 1979. We believe that, had he known that he was still in arrears for the last quarter of 1979, Nevarez would have remitted the same on 17 December along with the other dues he remitted that day. As it turned out, Nevarez did not learn that he was still in arrears for the last quarter of 1979 until sometime during the first week of January 1981 (the exact date being unknown) when he received the Union's 30 December letter advising him that he still owed $66.70 plus a reinstatement fee, and that his membership had "ceased." By then, however, the Union had already requested his discharge. As noted above, at no time was Nevarez informed that he would be discharged unless that amount was paid or that his discharge had already been requested nor was he told what the $66.70 represented.[15]

On the basis of the above facts, we find that, while Nevarez was remiss in not paying his dues in a timely manner, there is no evidence to indicate that he consciously and willfully sought to evade his financial obligation to the Union.[16] As a consequence, the Union was not relieved of its fiduciary obligation of informing Nevarez of his dues delinquency and giving him an opportunity to make such payment before requesting his discharge. This it failed to do. Accordingly, by causing the discharge of Nevarez the Union violated Section 8(b)(2) and (1)(A) of the Act, as alleged.[17]

THE REMEDY

Having found that by engaging in the above-described conduct the Union has violated Section 8(b)(2) and (1)(A) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative actions in order to effectuate the policies of the Act.

The Union shall be ordered to make Evan Nevarez whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages from the date of his discharge to the date of his reinstatement. The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*,

[13] Although the record indicates that the Union closes its books sometime during the month of December and apparently mails out notice of dues delinquencies to its members shortly thereafter, there is no evidence to indicate that Nevarez was notified in December 1979 that he was in arrears for the last quarter of that year. Nor had the Union, prior to the 30 December 1980 letter, notified or warned Nevarez of his dues delinquency.

[14] The failure of Nevarez' 17 December check to arrive before the 22 December discharge request may be attributed to delays in the postal service caused by the high volume of Christmas mail.

[15] It is significant to note that, while Nevarez owed only $66.70 in back dues, the Union's discharge request, which apparently was prepared prior to its receipt of Nevarez' 17 December check and prior to its 30 December letter advising Nevarez that he owed only $66.70 in dues, stated that Nevarez owed dues for 15 months. Thus, it is clear that when Nevarez was discharged on 8 January 1981 the Union's discharge request, upon which Macy's relied in effectuating the discharge, inaccurately reflected the amount of dues owed by Nevarez.

[16] Thus, this case is clearly distinguishable from *Big Rivers Electric Corp.* and *Ralph's Grocery, supra*, relied upon by the Administrative Law Judge, since the evidence in those cases clearly revealed that the employees in question deliberately avoided their financial obligations.

[17] In view of our finding herein, the following language is hereby substituted for the Administrative Law Judge's Conclusion of Law 3:

"3. By causing or attempting to cause R. H. Macy & Co., Inc., to discharge Evan Nevarez for his failure to tender periodic dues without first adequately advising him of his obligation to do so, Respondent Local 3, International Brotherhood of Electrical Workers, has violated Section 8(b)(2) and (1)(A) of the Act."

90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[18]

The Union shall also be ordered to expunge from its files any reference to Nevarez' unlawful discharge and shall be required to notify Nevarez, in writing, of its actions as well as inform him that his unlawful discharge shall not be used as a basis for future action against him. Furthermore, the Union shall be required to ask the employer, R. H. Macy & Co., to remove from its files any reference to Nevarez' unlawful discharge and shall notify Nevarez that it has asked his employer to do so.[19]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 3, International Brotherhood of Electrical Workers, Bronx, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause R. H. Macy & Co., Inc., to discharge or otherwise discriminate against Evan Nevarez, or any other employee, for failure to tender periodic dues without adequately advising him of his obligations, in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make Evan Nevarez whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the section above entitled "The Remedy."

(b) Expunge from its records any reference to the unlawful discharge of Evan Nevarez and notify him, in writing, that this has been done and that evidence of his unlawful discharge shall not be used as a basis for future action against him.

(c) Post at its business office copies of the attached notice marked "Appendix."[20] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 2 for posting by the Employer at its place of business in Bronx, New York (Parkchester store), in places where notices to employees are customarily posted, if the Employer is willing to do so, and ask the Employer to remove any reference to Nevarez' unlawful discharge from the Employer's files and notify Nevarez that it has asked the Employer to do this.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case 2-CA-17890 be, and it hereby is, dismissed in its entirety.

[18] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[19] The Board in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), has held that such expunction remedies are necessary in all cases of unlawful discipline. While that case, unlike the instant one, involved the unlawful discharge of an employee by his employer, the Board has nevertheless held that an expunction order is just as necessary and appropriate in situations where a union has unlawfully caused the discharge or layoff of an employee. *Boilermakers Local 27 (Daniel Construction)*, 266 NLRB 472 (Apr. 6, 1983). Although the union's unlawful conduct in *Daniel Construction* resulted from a discriminatory application of its hiring hall procedures, we see no reason for limiting the issuance of expunction orders to only those unions who discriminate through the use of unlawful hiring hall practices. Rather, as in *Sterling Sugars*, we find the issuance of expunction remedies against unions to be necessary and appropriate in all cases where a union causes an employee to be unlawfully discharged, laid off, or otherwise discriminated against.

[20] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT cause or attempt to cause R. H. Macy & Co., Inc., to discharge or to otherwise discriminate against Evan Nevarez, or any other employee, for failure to tender periodic dues without adequately advising him of

his obligations, in violation of Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL make Evan Nevarez whole for any loss of pay suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the discharge of Evan Nevarez and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future action against him, and WE WILL ask the Employer to remove any reference to Nevarez' unlawful discharge from its files and will notify Nevarez that we have asked the Employer to do this.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge: The hearing in this matter was conducted in New York, New York, on February 10 and 11, 1982, upon two separate complaints which had been consolidated for hearing by Order dated May 5, 1981. The first complaint, which had been issued on March 30, 1981, against Local 3, International Brotherhood of Electrical Workers, hereinafter referred to as Local 3 or the Union, was based upon an unfair labor practice charge which had been filed on February 26, 1981, by Evan Nevarez. The second complaint, which had been issued on April 7, 1981, against R. H. Macy & Co., Inc., hereinafter referred to as Macy's, was based upon a charge which had been filed by Nevarez on March 4, 1981. The complaint against Local 3 alleges that it violated Section 8(b)(1)(A) and (2) of the Act by causing Macy's to discharge Nevarez on January 8, 1981, pursuant to a union-security clause in the collective-bargaining agreement then in effect under circumstances where Local 3 failed "to fulfill its fiduciary duty to adequately notify Nevarez of the exact deadline for compliance by him with his obligation to pay dues and initiation fees . . . and the consequences for his failure to comply with the union-security provision . . . and notwithstanding that [Local 3] had agreed to accept and did accept Nevarez' tender of the dues and initiation fees owed." At the hearing, General Counsel, for the first time, also accused Local 3 of having been motivated in its aforesaid conduct by Nevarez' purported activities as a dissident union member, a contention apparently raised for three reasons. First, it was asserted that evidence of hostility was important as background to the violations as alleged in the complaint. However, General Counsel conceded that, while motive was "not necessary" to the complaint allegations, it was "not necessarily irrelevant" either. Second, it was asserted that the issue of hostility was raised as an "alternative theory." However, General Counsel expressly refused to amend the complaint stating that "it's the position of the office that it's not necessary to articulate the theory of the case," and further that, even if warranted by the facts, he did not seek an independent finding of violation based upon the reprisal nature of Local 3's conduct. Third, it was claimed that Local 3's hostility towards Nevarez is significant in determining the backpay period which might be required in the event a violation is found. Notwithstanding the ambiguities in General Counsel's position concerning Local 3's alleged hostility, General Counsel was permitted the opportunity to litigate the matter and evidence was adduced, thus presenting this additional issue for disposition.

The complaint against Macy's presents a simpler case. It is alleged that Macy's discharged Nevarez pursuant to Local 3's demand, and pursuant to a valid union-security provision, but under circumstances where Macy's ignored Nevarez' protests that he was a Local 3 member in good standing, and without "conducting an investigation into the validity of the Union's demand."

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:[1]

FINDINGS OF FACT

I. JURISDICTION

The complaints allege, and both Respondents admit, that Macy's is a New York corporation with its principal office and place of business at 34th Street in the city and State of New York, where it is engaged in the operation of retail department stores, including the store involved in this proceeding located in the Bronx, New York, and referred to as its Parkchester store; and that Macy's annually derives gross revenues in excess of $500,000, and purchases and receives at its Parkchester store goods and supplies valued in excess of $50,000 directly from locations outside the State of New York. Accordingly, I find that Macy's is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaints also allege, both Respondents admit, and I find that Local 3 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Nevarez' Employment History*

Nevarez began work for Macy's as an electrician in the Parkchester store in January 1978. Throughout his employment he was covered by a collective-bargaining agreement between Macy's and Local 3 which, *inter alia*, required employees in the bargaining unit, as a condition

[1] I have also considered the very helpful brief filed by Macy's, a letter memorandum filed by Local 3, and statements of position urged by General Counsel and Local 3 in their oral argument on the record.

of employment, to become and remain members of Local 3 after 30 days of employment. Although the bargaining unit was rather large, covering employees in a number of job classifications employed at seven Macy's stores operated in the New York City area, there were only two unit employees at Parkchester and Nevarez was the sole electrician. Since there was no dues-checkoff provision in the contract, employees in the bargaining unit paid their dues directly to Local 3. According to Nevarez, his practice had been either to mail his dues or to visit Local 3's office for direct payment. In either case, when he did pay he claimed he did so on a quarterly basis in advance, testimony which I reject as incredible and belied by Local 3's records which I find infinitely more reliable. Thus, in 1978 his dues for April, May, and June were paid in May; and those for July, August, and September were paid in August. In 1979 dues for January through June were paid in March, and those for July through September were paid in August. What happened thereafter is the subject of this case and is discussed below.

Nevarez had been a Local 3 member before 1978 and had obtained his Macy's job through Local 3. Just prior to that, Nevarez had worked at another Local 3 job, where he had, as he put it, "a slight encounter" over his dues payments, which incident made him aware that failure to pay dues when employed under a union-security contract would result in discharge.[2] He testified that he knew from the start of his Macy's employment of his obligation to be a member of Local 3, knowledge confirmed by his own reading of the Macy's contract. Despite this knowledge, despite his prior history of late payments, and without offering any explanation whatsoever for his actions (either to Local 3 or at the hearing), Nevarez stopped paying dues in October 1979 and made no attempt to pay dues again until he mailed a check to the Union on December 17, 1980. His decision to finally make a payment was prompted by his belief that Local 3 closed its books at the end of the year and if he did not correct his dues delinquency by that time he would be discharged pursuant to the union-security provision.

Although he was not certain of how much money he actually owed, Nevarez guessed he was either three or four quarters in arrears. Therefore, he mailed a check to Local 3 on December 17, 1980, in the amount of $252.80, which was $4 less than the amount which would have covered four quarters.[3] However, the fact of the matter was that Nevarez owed dues for the last quarter of 1979 in addition to his 1980 dues, which made his delinquency for dues alone at the time he mailed his check $319.50.[4] Lest there be any doubt, the finding as to his total delinquency is based upon Local 3's records, Nevarez' testimony that he not only was uncertain of the amount he owed but that Local 3's subsequent demand for additional moneys was correct, and the gravamen of the complaint which places in issue the alleged inadequacy of Local 3's notice to Nevarez but not the amount claimed. Indeed, the General Counsel does not dispute that Local 3 was due all the moneys it sought to collect from Nevarez. In any event, although Nevarez knew he had to correct his dues delinquency or lose his job, and although by his own admission he was not certain of the exact amount that he owed, he made no effort to ascertain that figure from Local 3 prior to his mailing the check, just as he made no attempt to explain to Local 3 why he had not paid dues.

B. *Local 3's Demand for Nevarez' Discharge*

Nevarez' apprehension was well founded for Local 3 had begun the process of identifying delinquent members. On December 14, 1980, the executive board discussed Nevarez' dues status, a routine procedure according to the credited testimony of William Fiedler, Jr., the Union's recording secretary. Fiedler explained that an examination of the dues records disclosed there were then about 12 members, out of an approximate membership of 36,000, who were not current in their dues and to whom a form letter was sent bearing a facsimile of Fiedler's signature. The letter to Nevarez was dated December 30, 1980, and was mailed to his home on Unionport Road in the Bronx.[5] This letter, which Nevarez testified he received prior to January 8, 1981, advised him that at the executive board meeting his dues record had been discussed and he was listed as a "ceased member of Local Union No. 3."[6] The letter also advised him that his membership was valued by the Union and that if he wished to remain a member he would "be required to pay the amount of $66.70 plus a reinstatement fee of $30.00 which will assure [his] good standing until December 31, 1980." He also was requested "to communicate with [Local 3] on [his] future plans." The letter, which was preprinted except for the addressee, dates, and amounts, made no mention at all of Nevarez' union-security requirement at Macy's in the sense that it did not recite a deadline for payment in order for Nevarez to keep his job. Nor did it calculate the computation of the $66.70 figure. However, simple mathematics discloses that, since Nevarez' total dues arrearage was $319.50 and he paid $252.80 towards that debt, he still owed $66.70. Within a few days of its receipt (clearly after the deadline of December 31 recited in the letter), Nevarez telephoned Local 3 and spoke to someone in the recording secretary's office. He testified that he questioned the contents of the letter and was told that his records showed him to be a "ceased member," but that if he paid the

[2] Nevarez testified to his having "had problems" regarding his failure to pay dues as far back as 1972, although these problems were not shown to have been related to union-security provisions; except as just noted, payments while at Macy's were not made timely.

[3] In 1980 dues were $21.40 per month.

[4] In 1979 dues were $20.90 per month.

[5] Nevarez had moved to this address in late 1979 or early 1980, but continued to receive mail at his former address on Givan Avenue in the Bronx where he had shared quarters with his in-laws. He did not give the Union, or the post office, notice of his new residence, notwithstanding that his in-laws also moved sometime in 1980. The dues department of the Union obviously had his new address, but the source of that information is not explained in the record.

[6] Fiedler explained a "ceased member" is one whose dues are in arrears 6 months or more, while a "lapsed member" is one whose dues are in arrears 3 months. Although a "lapsed member" still is considered as a member, and a "ceased member" is not, both must pay a reinstatement fee to restore full membership. Only a "ceased member" is sent the kind of letter received by Nevarez, which may explain that in December 1979, when he was only 2 months in arrears, no notification of this kind was mailed to him.

amount requested he would be reinstated. Nevarez did not protest that the amount was inaccurate in any way, nor does it appear that he asked for a detailed computation. Nevertheless, he made no attempt to immediately pay the amount due, nor did he in that conversation, or immediately thereafter, inform Local 3 that the arrearage would be forthcoming.

On December 22, 1980, James Mulligan, a Macy's executive, told Virginia Caillouette, vice president for employee relations at Macy's, that he had been requested by Frank Montemagno, a Local 3 business representative, to discharge Nevarez because his dues had not been paid for a long period of time. Caillouette told Mulligan that such a request had to be made in writing. As a result, a letter dated December 26, 1980, and signed by Frank Montemagno was mailed to Caillouette and was received by her on January 5, 1981. In pertinent part, the letter states, "Our records in the Dues Department show that Evan Nevarez, is not a member in good standing with Local No. 3, IBEW as he has not paid his dues since September, 1979. I therefore request that Evan Nevarez be terminated from his job as of this date." Caillouette credibly testified that she then examined the union contract, determined that the request was proper and consistent with that agreement, and so notified Shirley Thompson, personnel manager at the Macy's Parkchester store on January 6, that Nevarez was delinquent in his union dues and pursuant to the union contract was to be discharged.

Thus it was that on January 8, 1981, Nevarez was called into Thompson's office about 1 p.m. and told that he was discharged pursuant to a written request from the Union because of his failure to pay his dues as required by the contract. She further told him to return all Macy property then in his possession, such as credit card, tools, and keys, and that he would be paid for 3 days of vacation due him. She then told him he should finish whatever work was then in process and leave the premises.

Nevarez responded by stating that there was something wrong, that he thought a mistake had been made, and that the Union was out to get him because of a discrimination suit he had filed against it sometime before that. Thompson replied that this was a matter he would have to take up with the Union, but that he was discharged, as required by the union contract, because he had not paid his dues. Nevarez, however, did not dispute, or question in any way whatsoever, the assertion that he was delinquent in his dues. Nor did he express any reservation about the existence of the union-security provision or its application to him. He made no mention of the fact that he had received the December 30 letter from the Union and had confirmed its accuracy in a later phone conversation, which may be why he also made no reference to his having sent a check to Local 3 on December 17 for what obviously was a partial payment of his dues delinquency. His statement concerning the alleged filing of a discrimination suit was not expanded upon in any way, but clearly it was not linked to his dues delinquency either.

Nevarez claimed that after he left Thompson's office he went immediately to the union office for the purpose of paying his dues delinquency. After being rebuffed by Montemagno who told him he no longer was a member, Nevarez proceeded to the dues department where he showed the December 30 letter to a clerk and was told that if he paid the amount stated his membership would be reinstated. Nevarez further claimed he drew a check for $225 to cover the $96.70 then owing as well as dues for two quarters in advance.[7] Nevarez dated the check for January 9, 1981, explaining in his testimony that he did so because he was then short of funds in his checking account and intended to cover the check by a deposit the following day. However, Nevarez' checkbook fails to disclose a record of any deposit on any day during this entire period of time, nor did Nevarez produce at the hearing a deposit slip or a paid dues receipt he claimed he received, supporting his testimony.[8] Indeed, the checkbook does not even record the January 9, 1981, check, nor does it reflect a running balance. Under these circumstances, I find that Nevarez, who was not a credible witness in many respects (see below), and whose demeanor while testifying was indicative of a person seeking to contrive and structure testimony in a favorable light, did not know his checkbook balance on January 8, 1981, and did not give Local 3 a check for dues on that date. Such a check ultimately was paid to Local 3, which check was deposited by the Union on January 20, 1981, along with the check previously sent and dated December 17. I deem it unnecessary, under the circumstances of this case, to determine on what date after January 8, 1981, Nevarez actually gave the money to the Union as it has no bearing on the ultimate disposition of the issues.

Later that afternoon, Nevarez returned to Thompson's office, although he concedes he was not invited to do so. Thompson's credited testimony is that he showed her a union membership card in his name but that she pointed out to him that the card was valid for that purpose only if there was a marking thereon that dues had been paid, and that no such notation appeared. She asked him to produce a dues receipt and he did not. Nevarez showed her nothing beyond this blank membership card, which again was not produced in evidence at the hearing and again warrants the inference that whatever it was he did show Thompson did not contain a notation that he was a paid-up union member. Indeed, Nevarez did not tell Thompson that he had even visited Local 3 that afternoon, he made no mention of his having drawn a check to the Union, he did not offer to show her his checkbook, and he did not even suggest to Thompson that he had cleared his outstanding dues obligation. That conversation was a relatively brief one and ended with Thompson telling Nevarez that he still was discharged from Macy's.[9]

[7] At that time dues were $64.20 a quarter. The amount for two quarters added to the debt of $96.70 totals $225.10. The missing 10 cents is of no consequence to any of the issues.

[8] The inference is warranted that such records presumably in his possession, if produced, would have been unfavorable to his case. *Whitin Machine Works*, 100 NLRB 279, 285 (1952).

[9] I discredit Nevarez with respect to these two conversations wherever his testimony conflicts with that of Thompson, who was a forthright, responsive, and careful witness, and whose testimony was consistent with a

Continued

C. *Postdischarge Events and the Question of Hostility*

On January 11, 1981, Nevarez telephoned Montemagno inquiring as to his status at Macy's inasmuch as his dues had been paid. Although Montemagno allegedly expressed displeasure with him for having gone over his head, he nevertheless told him that a letter would be sent to Macy's and to him advising that he should be returned to his job. Nevarez denied that he ever received such a letter and no evidence was adduced that a letter was mailed to him. However, a letter signed by Montemagno was received by Macy's (Caillouette) on January 30, 1981, bearing the date of January 27, addressed to Nevarez at his Givan Avenue address[10] stating, "You are requested to report to work when you receive this letter. Show this letter to your supervisor as your authorization to report to R. H. Macy's Department Store in Parkchester." In the meantime, as Thompson credibly testified, she had asked the Union (she was not asked whom she dealt with) to send a replacement employee for Nevarez immediately after she discharged him, and such replacement began work on January 26. It should be recalled that Nevarez was the only employee in his job classification at Parkchester. Further, according to the credited testimony of Caillouette, she received a phone call from Montemagno at the end of January in which he requested that Nevarez be reinstated because his dues had been paid. Caillouette replied that he already had been replaced by another Local 3 electrician but that in any event it was Macy's policy not to reemploy anyone who had been discharged properly, and for cause, as was the case with Nevarez. Accordingly, Montemagno wrote to Nevarez by letter dated February 2, 1981, this time addressed to his Unionport Road home, advising him that Macy's would not return him to work but that Local 3 would refer him to any job it might know of in his salary range. In addition, if he was interested in jobs at a lower pay rate he was asked to advise the Union, which, in any event, was anxious to meet with him at his "earliest convenience to discuss any future jobs."

Upon receipt of the letter Nevarez telephoned Montemagno for an explanation, which was given, of what had happened. Nevarez testified that Montemagno offered him two or three other positions which he rejected because he wanted to work only at Macy's. At this point in the conversation Montemagno heatedly argued with him and said, "Well go see Sam Lopez." Nevarez replied that Montemagno, not Lopez, was his representative. Nevarez testified that Lopez then was president of an organization to which he belonged known as the United Third Bridge, which mainly consisted of Black and Hispanic union members who were of the belief that Local 3 had not been representing them fairly. Nevarez was not shown to have engaged in any particular or significant activity in this group prior to this date nor is there any evidence remotely suggesting that Local 3 harbored resentment toward Nevarez or the group.

In addition to the possibility of jobs other than at Macy's as offered by Montemagno, Nevarez testified that Local 3's attorney, Norman Rothfeld, also met with him in February 1981, advised that Macy's would not return him to work, and inquired if he wished to work elsewhere. When Nevarez expressed interest in a job near his home where other Local 3 electricians had been working, Rothfeld told him to visit the job and inquire of the steward if there were any vacancies, a suggestion made to him by Rothfeld on a number of occasions. Nevarez did not pursue these suggestions because Rothfeld was the Union's lawyer, and not his representative, and he thought it was his representative's "job to represent me not [Rothfeld] . . . he's the one who is supposed to talk to me personally." Despite this belief Nevarez did not take up the matter with Montemagno either.

On February 2, 1981, Montemagno also wrote to Caillouette asking her to reconsider the decision not to reinstate Nevarez and in any event to hire him "for the first available vacancy similar to the position he left." Perhaps because of this letter, or for another reason not disclosed by this record, Nevarez returned to work at the Parkchester store in late May 1981. Finally, and solely with respect to the issue of union animus, the record discloses that on March 27, 1980, Local 3 represented Nevarez at a grievance meeting with Macy's concerning disciplinary action based upon his allegedly having been late 18 times, absent without authorization 5 times, and failing to punch a timeclock twice. And the Union also grieved his discharge from another employer in 1977 for absenteeism and short days of work. The arbitrator reduced the discharge to a disciplinary suspension without backpay.

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pretrial affidavit given to the General Counsel and used by the General Counsel in an attempt to impeach her credibility. Nevarez' version of the first conversation was that Thompson did not discharge him but merely advised him that he was delinquent in his dues, to which he replied there had to be a mistake of an unspecified nature. Although Nevarez testified that nothing of real significance was said at the meeting he estimated it lasted anywhere from 5 minutes to an hour but most likely 15 minutes, and at the conclusion Thompson told him to go to the Union, straighten out his problem, and Macy's would pay him for the day. Nevarez went to the Union, paid his dues, returned to Thompson's office, and was fired notwithstanding he showed her a Local 3 card. It was at this second meeting that Thompson told him to return his Macy property and at which the vacation money was discussed. Nevertheless, he testified that the second meeting took less time than the morning meeting. He did admit that he was not requested by Thompson to return later but could not explain then why he did so. And although Nevarez denied that he was fired at the first meeting, he testified that at the second meeting Thompson told him that he would not be rehired. In his words, she said that Macy's "ain't going to hire you back." Nevarez also conceded he did not tell Thompson at the first meeting that his dues were paid, and that when he showed her a Local 3 card at the later meeting she remarked it was valid only if it was marked paid. I reject Nevarez' account of these meetings not only because, as noted above, his demeanor was such that portions of his testimony were unbelievable, but because he appears to have deliberately structured his testimony to create the General Counsel's theory of the case; namely that he was not fired until the second meeting, at which time he already had paid his dues to the Union, a circumstance that Macy's should have, and would have, uncovered had it made a reasonable inquiry and had it acted with due diligence. His version of the critical events that day are improbable, internally inconsistent, and simply incredible. His testimony is reflective of the irresponsible way in which he treated his dues obligation and was a bold attempt to extricate himself from the difficulty in which he had placed himself.

[10] See fn. 5, *supra*. Why Montemagno did not know of Nevarez' new address, while the dues department did, is unexplained (Montemagno did not testify).

Analysis and Conclusions

Case 2-CB-8728

The principle issue as framed in the complaint, and argued by the General Counsel, is whether or not Local 3 fulfilled the fiduciary duty it owed to Nevarez by giving him adequate and timely notice that his failure to correct his admitted dues delinquency would result in his discharge pursuant to the union-security clause in the collective-bargaining agreement with Macy's. The General Counsel argues that Nevarez was not properly advised of the period of dues delinquency and the method of calculating the amount owed, was not given a reasonable deadline for payment, and was not even informed that membership was a condition of employment. The second issue framed by the complaint is: Did the Union demand Nevarez' discharge notwithstanding that on January 8, 1981, it accepted the dues and initiation fees then owed by him (the use of the words "initiation fees" appears to be an inadvertent misnomer)? Presumably, this is an alternative argument. Finally, the General Counsel, as noted above, argued at the hearing another alternative theory of violation; i.e., the claim that, assuming, *arguendo* proper notice, the demand for Nevarez' discharge was to mask the Union's true motive in seeking to have Nevarez fired—to wit, to visit reprisal upon him because he engaged in protected activity as a dissident member. Of the foregoing theories, it is the first one which clearly is the more viable and which appears to be the one primarily relied upon.

All parties acknowledge that there was in existence a valid union-security clause pursuant to the proviso to Section 8(a)(3) of the Act which required that Nevarez become and remain a member as a condition of employment by Macy's. It further is acknowledged by all parties that Nevarez failed to keep his membership current and that he owed substantial dues to the Union at the time of the events which led to his discharge. All parties also recognize there is a general rule that imposes a fiduciary duty upon unions seeking compliance with a union-security clause. The obligation to deal fairly with the employees it represents in this context has been definitively recited by the court of appeals in the *Philadelphia Sheraton* case[11] as follows:

> The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization. There necessarily arises out of this dependence a fiduciary duty that the union deal fairly with employees. . . . At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure. . . . The union may not evade this duty, as the Local did here, and then demand the dismissal of the employee when he becomes delinquent in the payment of his dues.[12]

A union's obligation under the foregoing statement of principle requires "that it give actual not constructive notice" to an employee that membership is required as a condition of employment, that the employee be informed of the amount of dues delinquency and its method of computation, and that the employee be given "a reasonable opportunity to meet his [dues] obligations."[13]

The purpose for these rules, however, is not to throw an automatic blanket of protection over every delinquent employee, but rather they are designed to assure that "as a practical matter the Union has taken the necessary steps to make certain that a reasonable employee will not fail to meet his membership obligation through ignorance or inadvertence but will do so only as a matter of conscious choice."[14] This is in accord with the Board's longstanding policy that the rules it imposes on unions and employers in their administration of union-security agreements are to be consistent with the ability of the parties to effectively enforce such requirements and in a manner which would not undermine those agreements by permitting dissident members to "frustrate the orderly administration of lawful collective-bargaining agreements by delaying payment of dues and fees they are lawfully obligated to pay until the last minute before their actual discharge."[15] It has been said that the limitations and obligations placed upon employers and unions in the enforcement of union-security arrangements are for the purpose of protecting those employees who are willing to pay their dues obligations as opposed to those referred to as "free riders." It was congressional policy "not to protect free riders against excessive union demands, but rather to insure that employees who were willing to pay their financial obligations were not discharged for improper reasons."[16]

A simple inquiry confined solely to the December 30, 1980, letter, the only written notice given, leaves no doubt that the Union did not adequately notify Nevarez that his job was in jeapordy pursuant to application of the union-security clause. Indeed, that notice was not intended to serve that purpose as it clearly was designed merely to advise members of their membership status unrelated to any specific job. That letter did not give Nevarez a breakdown of his dues arrearage showing the period of default and method of calculation. It did not afford him a reasonable deadline for payment, nor did it, in so many words, tell him of the existence of the union-security clause. But the circumstances of this case do not allow for a simplistic and mechanical approach.

Although the Union does not appear to have told Nevarez his continued membership was required as a condition of employment, and although the Union's fiduciary obligations are owed to senior as well as newer employees, it would be senseless to overlook the fact Nevarez had precise knowledge of the union-security clause and how it affected him. While it is not certain how Nevarez acquired this knowledge during the 3 years of his em-

[11] *NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963), enfg. 136 NLRB 888 (1962).
[12] *Id.* at 258.
[13] *Boilermakers Local 732 (Triple A)*, 239 NLRB 504 (1978).
[14] *Conductron Corp.*, 183 NLRB 419, 426 (1970).
[15] *General Motors Corp.*, 134 NLRB 1107, 1109 (1961).
[16] *Seafarers Great Lakes District (Tomlinson Fleet)*, 149 NLRB 1114, 1121 (1964).

ployment at Macy's, he did concede at the least he knew of his dues obligation as a result of his having read the collective-bargaining agreement, an agreement incidentally from which Nevarez reaped benefits as witnessed by the Union's having successfully grieved a disciplinary action brought against him by Macy's.

Similarly, the record is also quite clear that Nevarez knew he was delinquent in his dues payments for a substantial period of time and that there were no special circumstances present, such as a hiatus in the contract or break in his employment, which reasonably could have caused him to doubt that he owed dues for a lengthy and unbroken period of time. We need look no further than his own testimony that he sent the payment to the Union on December 17, 1980, because he realized that at the end of the year the Union closed its books and he would be discharged if he remained delinquent at that time. Although he miscalculated his debt, the December 30, 1980, letter notified him that he still owed dues for one additional quarter plus a reinstatement fee.[17] Not only did Nevarez not dispute this debt, but the evidence shows that he received what must be presumed to have been a satisfactory explanation from the Union when he telephoned in early January 1981, was given confirmation of those amounts after a check of his records, and was told that if he paid these sums his membership would be reinstated. Thus, while the issue is not entirely free of doubt, and the form of notice was not as precise as it could have been, I conclude that in the first week of January 1981 Nevarez had received adequate and sufficient notice regarding his union-security obligation, the amount of money due and owing, the period of delinquency, and the method of calculation. However, there is no doubt at all that no formal warning to clear his dues delinquency by a date certain or face discharge was accorded him. Not only had no such notice been communicated to Nevarez, but Local 3 had initiated the request for his discharge without so advising him. Despite this failure, the fact remains that Local 3's request had not been acted upon by Macy's at the time Nevarez had received the aforedescribed notices, and it is in this posture that the ensuing discharge must be evaluated. If rigid adherence to strict rules of notice are to be required, then Local 3 must be held in default at least with respect to this one undisputed failure.

It should be obvious from the cases cited above that whether or not a union has complied with its fiduciary duty and dealt fairly with employees is not to be decided in a vacuum, but must take into consideration the actions of the employee as well. The duty of fair dealing is a concept in equity and must be equitably applied, a principle firmly imbedded in law as the Board only recently has reiterated in a context very similar to the case at hand. "Moreover, assuming *arguendo* that the Union did not fully comply with its fiduciary obligation, the Board never intended these requirements 'to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member. . . .' *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB 117, 124 (1974)."[18] The instant case turns, therefore, on whether or not Nevarez was a "free rider" or "recalcitrant employee" who should not be permitted to take refuge behind those rules which were established as protection for the employee willing to meet his financial obligations to the union.

In my judgment Nevarez' entire course of conduct qualifies him as a "free rider" in the classical sense. His unreasoned and unexplained failure to pay his dues for 15 months was calculated and deliberate, and designed to take advantage of the Union's lax policy in not sending notices until the end of the year, and then only to those in arrears 6 months or more. Nevarez escaped detection in 1979 and avoided payment until December 1980 when, on his own volition, he sent a check to the Union for what he believed would satisfy his debt. Having miscalculated, yet still having avoided discharge, he failed to make a prompt payment even when given one last chance to do so in early January. Again, by his own testimony, he knew what he owed, he knew how and why he owed it, he knew that membership was a condition of employment, and, as far as he knew he still had time to restore his membership. Nevertheless, he continued his pattern of avoidance and deceit, and only after he was fired on January 8, 1981, did he seek to pay his debt. When his discharge was not rescinded he distorted the facts in an attempt to make it appear that he had paid his dues prior to his discharge.

Under all of the circumstances I can only conclude that Nevarez' recklessness and irresponsibility grew out of a willful refusal to abide by the union-security obligation as his actions most certainly were not those of an employee who had made an honest mistake in an effort to comply with this obligation.[19]

Therefore, under the circumstances, I find *Big Rivers Electric Corp., supra*, and the cases cited therein, controlling, for Nevarez, like Melton in *Big Rivers*, refused to make dues payments although fully aware they were required. Although Melton had been given repeated warnings and Nevarez had not, I find that Nevarez was so thoroughly familiar with the obligation and was so egregiously and deliberately in arrears that repeated warnings would have been a futility. Nevarez' predicament was of his own doing and as a "free rider" he sought "to evade the union-security obligations of the contract, as long as he was able to do so, and until it was discovered that he was not a member in good standing."[20] The special circumstances of the instant case, no less so than those in the *Big Rivers* and *Ralph's Grocery* cases, remove from

[17] The General Counsel does not argue that the assessment of the reinstatement fee was improper in any respect.

[18] *Big Rivers Electric Corp.*, 260 NLRB 329 (1982). Accord: *Seafarers, Great Lakes District (Tomlinson Fleet), supra.*

[19] Nevarez did not make timely payments for 4 months in the 18-month period between April 1, 1978, and September 30, 1979, unexplained failures which I also have taken into account.

[20] *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB at 125. The General Counsel's reliance on *Forsyth Hardwood Co.*, 243 NLRB 1039 (1979), is misplaced. The employee's dues delinquency did not relieve the union of the more formal notice procedures in that case because that employee, unlike Nevarez, was not found to have been deliberately in default and a "free rider." As the Administrative Law Judge noted, the union was obliged to follow stricter notice requirements in order to avoid a discharge based upon a dues default which "occurs through honest error, miscalculation, oversight, or chance circumstances." *Id.* at 1044.

statutory censure Local 3's actions in causing Nevarez' discharge. The aforesaid findings are dispositive of the General Counsel's contention made at the hearing that the discharge was requested because of Nevarez' protected union activities as a dissident member. But even if the Union is found to have failed in its fiduciary duty, the record utterly fails to support the argument that such action was hostilely motivated. As found above, it was Nevarez who was hostile towards the Union rather than the other way around. In any event, there is no evidence that Nevarez, aside from his membership in a group of unhappy members, participated in any meaningful way therein, or engaged in significant protected activities. And to the extent he did participate, there is a paucity of evidence which might even suggest, let alone establish, that Local 3 was hostile towards Nevarez because of such reason.

What is demonstrated on the record is that whenever Nevarez had a problem the Union fully represented him. During his employment at Macy's Local 3 processed his grievance. After his discharge Local 3 offered, and Nevarez refused, the Union's assistance in securing him other employment, first on the ground that he would only work at Macy's and then on the frivolous assertion it was the Union's attorney and not the business agent who dealt with him. In addition, the evidence shows that Nevarez was not specially selected for the December 30, 1980, letter advising of his dues delinquency, but rather that he was one of a number of union members who received similar letters in accordance with the routine practices of the Union.

In response, the General Counsel points to Montemagno's statement to Nevarez to see Sam Lopez at the time Nevarez rejected an offer of possible employment other than at Macy's. This remark I find to be isolated, innocuous, and insubstantial. If indicative of annoyance, it is just as reasonable to assume that it was due to Nevarez' "free riding," coupled with his rejection of other employment, as to his "protected" activity. In any event, assumptions do not substitute for proof. Also relied upon by the General Counsel is the fact that Nevarez' replacement began work on January 26, 1981, prior to the Union's efforts to secure his reinstatement. Even if characterized as suspicious, which I do not, this circumstance, considered alone or in conjunction with other evidence, provides the basis for nothing more than conjecture and unsupported inference. This mere fact of timing is insufficient to establish that such timing was motivated by animosity towards Nevarez.

The General Counsel's final theory of violation by Local 3 is that it continued to seek Nevarez' discharge notwithstanding that it had accepted Nevarez' tender of dues and fees.[21] The fatal flaw in the General Counsel's argument is that there is not one shred of evidence in the record to support it. Whether Nevarez paid his dues on January 8, 1981, as he claimed, or thereafter, as I have found, Local 3 not only did not continue to seek his discharge beyond said dates, but indeed sought to have Macy's reinstate him. I have rejected as speculation the General Counsel's contention that the attempt to achieve such reinstatement was a sham and not in good faith because it was requested after a replacement already had been hired.

In view of my findings above that Local 3's request for the discharge was proper, it follows and I find that Macy's, in effectuating that request, did not violate the Act. Furthermore, even if it were found that Local 3 violated the Act because of a failure to fulfill its fiduciary duty in every respect, the conclusion that Macy's is exonerated from a violation nevertheless would be the same.

The theory for the violation against Macy's is that it did not conduct an investigation into the validity of the Union's demand for the discharge despite Nevarez' protest that an error had been made. Under the circumstances, that protest was nothing more than a gratuitous last gasp by him to delay the inevitable and was wholly without foundation. Apart from whether or not Local 3 properly notified Nevarez, there is no basis (as more fully discussed below) for holding that Macy's knew, or reasonably should have known, that Local 3 had violated its fiduciary duty, or that Nevarez was not, in fact, in arrears on his dues payments. If Macy's had conducted an investigation, it would have confirmed Local 3's claim that Nevarez had not paid his dues, a fact he himself would have had to concede. Thus, the question arises as to what sort of an investigation could lawfully have been required of Macy's where Local 3's request for discharge was based solely upon admitted nonpayment of dues. General Counsel offers no authority requiring an employer to conduct such a fruitless investigation. Macy's, on the other hand, correctly cites a number of Board cases where the employer was not found in violation of the Act, notwithstanding that the request for discharge by the union was improper, because the predicate for such violation, reasonable cause for the employer to believe that the request for discharge was based upon reasons other than the failure of the employee to pay the dues and fees required as a condition of employment, could not be established.[22]

In the instant case there could have been no such reasonable cause because the request for discharge was based solely upon Nevarez' failure to pay the required dues and fees. Furthermore, even if Local 3's request was improper, either because the fiduciary obligation had not been fulfilled or because the request was motivated by a reason other than Nevarez' failure to meet his financial obligations, the circumstances conclusively demonstrate that Macy's could not have had reasonable cause to believe that the request was invalid. The only evidence remotely bearing on this question was Nevarez' bare and unexplained statement to Thompson that an

[21] In *Longshoremen ILWU Local 6 (Colgate-Palmolive)*, 138 NLRB 1037 (1962), the Board held that although a union is under no obligation to accept a belated tender of dues and fees and may continue to insist upon the discharge of a delinquent member, once such belated tender is accepted the union has waived its right to insist upon such discharge.

[22] See, for example, *Allied Maintenance Co.*, 196 NLRB 566 (1972) (union violated fiduciary duty in failing to give proper notice); *Associated Transport*, 169 NLRB 1143 (1968) (employee not given notice of dues delinquency); *Krambo Food Stores*, 114 NLRB 241 (1955) (employees not in fact delinquent in dues). Cf. *Conductron Corp.*, 183 NLRB 419 (violation found where employer had reasonable cause to believe union violated its fiduciary duty).

error had been made because of a discrimination lawsuit. However, Nevarez offered no supporting details to Thompson and, when she remarked that he was being discharged only because of his dues problem, Nevarez made no protest and did not dispute the Union's claim.[23] Nevarez presented no evidence to Thompson even hinting that the claim was inaccurate; he did not mention that he had sent a check on December 17, 1980, that he had received the Union's December letter, or that he had subsequently spoken to the Union. Instead, he injected a cryptic remark unrelated to any known event or incident. Nor is there evidence that Macy's was aware of Nevarez' dissident union activity, such as it was, so that his remark to Thompson, it might be argued, was in a specific context. In short, insofar as Macy's was concerned, it had received notice that Nevarez was delinquent in his dues and it was entitled to accept that notice at face value in light of the utter failure of Nevarez to dispute the claim in any meaningful way. The evidence relied upon is insufficient to warrant an inference that Macy's had the requisite reasonable cause to believe Local 3's request for discharge was based upon a reason other than Nevarez' dues delinquency, or was unlawful because of deficiencies in the notice.

The General Counsel next asserts that Macy's violated the Act even if it had discharged Nevarez lawfully on January 8, 1981, because later that day, after Nevarez had paid his dues, Macy's was obliged to rehire him. Initially, that theory is without factual foundation for I have found that Nevarez had not paid his dues and fees in full on January 8, and that, even if he did, he did not so advise Macy's. Secondly, as a matter of law, the theory is unsound. Assuming, *arguendo*, that Nevarez had paid his dues after being discharged, and that Macy's knew of it, the case relied on by the General Counsel, *Forsyth Hardware Co., supra*, factually is inapposite and therefore does not suppport the proposition urged for it. The critical differences aptly are summarized by the Board in its decision in *Big Rivers Electric Corp., supra*, as follows:

> In *Forsyth*, an employer, pursuant to a union's request, *started the process for discharging an employee* who was delinquent in dues. Before that process was completed, however, the employee cleared the delinquency and notified the employer of this fact. The employer did not seek to determine the truth of the employee's assertion, *even though the union also intervened in the employee's behalf*, but instead completed the discharge process. The Board found the discharge a violation of Section 8(a)(3) since it found that, *before the discharge process had been completed*, the employer had been given reasonable grounds to believe the union's discharge request was no longer proper; nevertheless the employer did not investigate but simply completed the termination process. [*Big Rivers Electric Corp.*, 260 NLRB at 329–330. Emphasis supplied.]

Here the General Counsel seeks to apply the *Forsyth* rationale while acknowledging that the discharge process had been completed during the first interview between Thompson and Nevarez. That difference alone distinguishes the *Forsyth* holding. In addition, in *Forsyth*, the employee and the union notified the employer that the dues arrearage had been rectified, unlike the evidence presented by the General Counsel in the instant case, establishing that Nevarez, while claiming to have corrected the dues arrearage, failed to support it by a proper dues receipt or independent confirmation of any kind when requested to do so by Thompson. In light of Nevarez' earlier meeting with Thompson, his uninvited and unexpected return, his later ploy in attempting to present an unstamped membership card as a paid dues receipt, and on the credible evidence and the record as a whole, it would strain commonsense to the breaking point to find that Macy's (Thompson) had reasonable grounds for believing, at any time on January 8, 1981, that Nevarez' discharge was requested for any reason other than his nonpayment of dues and fees or otherwise was improper under the law.[24]

Therefore, I conclude that the allegations against Macy's are untenable under any theory advanced and shall recommend dismissal of the complaint issued against it in this matter.

CONCLUSIONS OF LAW

1. R. H. Macy & Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 3 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent Local 3 did not violate the Act in any respect alleged in the complaint against it.
4. Respondent Macy's did not violate the Act in any respect alleged in the complaint against it.

[Recommended Order for dismissal omitted from publication.]

[23] The record is silent regarding the nature of such a lawsuit, Nevarez' involvement, if any, when and where it was brought, or indeed if it exists at all.

[24] Cf. *Conductron Corp., supra*, where the Board found the employer to have independently violated the Act in refusing to reconsider its original discharge action but where, unlike here, the discharge itself was unlawful because of the failure of the employer to properly investigate at a time when it had reasonable cause to believe that the request for discharge was improper. *Conductron* is distinguishable in other major respects as well; e.g., the employer ignored the union's rescission of its discharge request when it discovered its own error in having asked for the discharge before giving the employee proper notice. Be that as it may, the General Counsel's reading of *Forsyth* as requiring an employer to rehire a lawfully discharged employee "within a short period of time" after he has cleared his dues delinquency is incorrect and contrary to precedent. *General Motors Corp., supra.*